

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
PAUL ERICKSON,
Defendant.

4:19-cr-40015

**DEFENDANT'S MOTION FOR HOME
CONFINEMENT DUE TO COVID-19**

Defendant Paul Erickson, by and through his attorney of record, Clint Sargent, respectfully requests that the Court consider a sentence of home confinement in lieu of a sentence to a Bureau of Prisons (BOP) facility for the following reasons:

1. Erickson's Heart Condition

Defendant Erickson was diagnosed last fall with a congenital defect in the aortic valve of his heart. His condition required three open-heart surgical procedures on back-to-back days in January, 2020 – procedures that resulted in the replacement of his defective valve with a biological heart valve and the permanent implantation of an electronic heart pacemaker to address a resulting cardiac arrhythmia. Erickson's lead physician during his recent medical episode is blunt: “[Erickson] should not be exposed to closed environments where COVID-19 concentrations are potentially present. Should patient contract COVID-19, he is a substantial risk for a compromised replacement heart valve or even death.” [See Exhibit A, letter from Dr. Jeffry Meyer of Sanford Health]. Despite Erickson's excellent post-operative recovery, he remains at specific risk for the precise threat posed by COVID-19.

2. Age + Serious Heart Condition = Unintended Fatal Consequences

Mr. Erickson appears to present a perfect storm of risk factors for COVID-19 – potentially leading to unintended fatal consequences if ignored.

- “Clinicians in China and New York have reported myocarditis, an inflammation of the heart muscle, and, more dangerous, irregular heart rhythms that can lead to cardiac arrest in covid-19 patients.” “One review . . . found that about 40 percent suffered arrhythmias and 20 percent had some form of cardiac injury . . .”¹
- “An initial study found cardiac damage in as many as 1 in 5 patients, leading to heart failure and death even among those who show no signs of respiratory distress.”²
- “COVID-19 can cause serious cardiovascular complications, including heart failure, heart attacks and blood clots that can lead to strokes . . .”³
- “But previous coronaviruses, such as SARS and MERS, offer insight. They were linked to problems such as inflammation of the heart muscle, heart attack and rapid-onset heart failure . . .”⁴

¹ Lenny Bernstein, Carolyn Y. Johnson, Sarah Kaplan and Laurie McGinley, *Coronavirus destroys lungs. But doctors are finding its damage in kidneys, hearts and elsewhere*, Washington Post (April 15, 2020); https://www.washingtonpost.com/health/coronavirus-destroys-lungs-but-doctors-are-finding-its-damage-in-kidneys-hearts-and-elsewhere/2020/04/14/7ff71ee0-7db1-11ea-a3ee-13e1ae0a3571_story.html?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most

² Markian Hawryluk, *Mysterious Heart Damage, Not Just Lung Troubles, Befalling COVID-19 Patients*, Kaiser Health News (April 6, 2020); <https://khn.org/news/mysterious-heart-damage-not-just-lung-troubles-befalling-covid-19-patients/>

³ Josh Barney, *Heart Attacks, Heart Failure, Stroke: COVID-19's Dangerous Cardio Complications*, UVA Today (May 15, 2020); https://news.virginia.edu/content/heart-attacks-heart-failure-stroke-covid-19s-dangerous-cardio-complications?utm_source=UVAResearchDigest&utm_medium=email&utm_campaign=UVAResearchDigest_06-20

⁴ American College of Cardiology, *What Heart Patients Should Know About COVID-19*, American Heart Association News (March 12, 2020); <https://www.nextavenue.org/heart-patients-coronavirus/>

- Even Erickson's testosterone level is his enemy in the pandemic: "We really think that baldness is a perfect predictor of severity [of COVID-19]" according to Professor Carlos Wambier of Brown University. "Scientists now believe that androgens . . . may boost the ability of coronavirus to attack cells." "In one study, almost 80% of coronavirus patients . . . were bald." "The link is now being called the 'Gabrin sign' . . . after the 60-year-old follically challenged ER doctor, Frank Gabrin, who died . . . in late March."⁵
- All of these negative outcomes were experienced by patients *without* an already existing underlying heart condition. The consequences for Mr. Erickson of contracting COVID-19 would be vastly more pronounced and severe.

3. Group Living Is the Perfect Petri Dish

There is substantial fear among health and correctional officials that the close quarters and living conditions present in dormitory-style minimum security federal prison camps is unusually conducive to the spread of highly communicable diseases like the "Coronavirus" (as COVID-19 is popularly known).

"The next site of a deadly coronavirus outbreak may not be a cruise ship, conference, or school. It could be one of America's thousands of jails or prisons."⁶ "If Covid spreads in a large, thousand-person facility, and within five days you have a

⁵ Lee Brown, *Bald men may be hit harder by coronavirus, scientists fear*, New York Post (June 11, 2020); <https://nypost.com/2020/06/11/bald-men-may-be-hit-harder-by-coronavirus-scientists-fear/>

⁶ German Lopez, *A Coronavirus Outbreak In Jails or Prisons Could Turn Into a Nightmare*, Vox.com (March 17, 2020); <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration>

thousand people with multiple chronic conditions who just got the virus, that has the potential to really overwhelm a health care system.”⁷ “Infectious diseases like tuberculosis and influenza spread rapidly in confinement, and there is every reason to expect that COVID-19 will do the same.”⁸

The future is already here. “. . . the five largest known clusters of the virus in the United States are not at nursing homes or meatpacking plants, but inside correction institutions.”⁹

4. South Dakota Is Not An Island

Among the roughly 174,000 current inmates within the national BOP system, 6,458 COVID-19 cases have been diagnosed – resulting (to date) in 88 deaths.¹⁰ South Dakota has been fortunate – thus far. Only five BOP staff members and 1 inmate have been diagnosed with COVID-19 within the state.¹¹ (Statistics that do not reflect Andrea Circle Bear’s tragic demise out of state.)

But that lucky streak cannot hold. According to Dr. Tyler Winkelman, Co-Director of the Health, Homelessness, and Criminal Justice Lab at the Hennepin Healthcare Research Institute in Minneapolis, “[a]ll prisons and jails should anticipate that the

⁷ Dr. Tyler Winkelman, *A Coronavirus Outbreak In Jails or Prisons Could Turn Into a Nightmare*, Vox.com (March 17, 2020); <https://www.vox.com/policy-and-politics/2020/3/17/21181515/coronavirus-covid-19-jails-prisons-mass-incarceration>

⁸ Brendan Saloner (Associate Professor) and Sachini Bandara (Assistant Scientist) Johns Hopkins Bloomberg School of Public Health, *To Protect Inmates and the Nation From COVID-19, Release Offenders Who Pose No Threat*, USA Today (March 17, 2020); <https://www.usatoday.com/story/opinion/policing/2020/03/17/protect-nation-covid-19-release-inmates-who-pose-no-threat/5072004002/>

⁹ Timothy Williams, Libby Seline and Rebecca Griesbach, *Coronavirus Cases Rise Sharply in Prisons Even as They Plateau Nationwide*, New York Times (June 16, 2020); <https://www.nytimes.com/2020/06/16/us/coronavirus-inmates-prisons-jails.html?referringSource=articleShare>

¹⁰ The Marshall Project, *A State-by-State Look at Coronavirus in Prisons*, The Marshall Project (June 18, 2020); <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>

¹¹ Ibid.

coronavirus will enter their facility.”¹² Health conditions and the threats of COVID-19 within federal prison facilities are highly unlikely to improve anytime soon due to the nature of the virus and the utter inability to maintain (even attempt?) “quarantine conditions” within federal facilities.

Amanda Klonsky, PhD, Chief Program Officer of The Petey Greene Program, offers this bracing reminder in the New York Times: “The American criminal legal system holds almost 2.3 million people in prisons, jails, detention centers and psychiatric hospitals. And they do not live under quarantine: jails experience a daily influx of correctional staff, vendors, health care workers, educators and visitors — all of whom carry viral conditions at the prison back to their homes and communities and return the next day packing the germs from back home.”¹³

Federal, state and county detention facilities will remain sites of acute infection long after the general public has learned to cope with the pandemic. All BOP facilities will inevitably confront COVID-19. A particular facility may appear “clear” today – but with virtually non-existent testing and continuous access to day rooms and supply rooms by inmates and staff, the only issue is “when” not “if” COVID-19 arrives. Less than 1% of all federal inmates have been tested to date.¹⁴

¹² See Nicole Wetsman, *Prisons and Jails are Vulnerable to COVID-19 Outbreaks*, THE VERGE (Mar. 7, 2020), <https://www.theverge.com/2020/3/7/21167807/coronavirus-prison-jail-health-outbreak-covid-19-flu-soap>

¹³ Amanda Klonsky, PhD, *An Epicenter of the Pandemic Will Be Jails and Prisons, if Inaction Continues*, The New York Times (March 16, 2020); <https://www.nytimes.com/2020/03/16/opinion/coronavirus-in-jails.html>

¹⁴ Taylor Miller Thomas, *How U.S. Prisons Became Ground Zero for COVID-19*, Politico (June 25, 2020); <https://www.politico.com/news/magazine/2020/06/25/criminal-justice-prison-conditions-coronavirus-in-prisons-338022>

5. No Immunity

Mr. Erickson (a cardiac patient over the age of 55) would be vulnerable within any facility long after any reasonable commencement of his sentence. Mr. Erickson continues to test negative for COVID-19 and thus has been granted no immunity to the Coronavirus. [See Exhibit B, COVID-19 antibody test results.] Robert Hood, former warden of Colorado's "Supermax" federal prison darkly jokes, "Instead of worrying, 'Who's carrying the shanks?' . . . [everyone now wants to know] 'Who's coughing?'"¹⁵

6. Candidate for Compassionate Release

If Mr. Erickson were sent to a BOP facility, at some point, he would likely be a candidate for release to home confinement due to all of the health circumstances discussed above and due to the nature of his offense. "A prime target for release nationwide would be the approximately 200,000 prisoners age 55 and older nationwide [in all types of incarceration facilities]. People in this group have lower recidivism rates, but they are at very high risk for coronavirus complications."¹⁶

The U.S. Attorney General as early as April 3 of this year recognized this danger to the non-violent federal prison population and explicitly ordered the BOP to begin "to prioritize the use of home confinement as a tool for combatting the dangers that COVID-19 poses to our vulnerable inmates."¹⁷ So urgent is this U.S. Attorney General order to

¹⁵ Chris Francescani and Luke Barr, Fearing outbreaks and riots, nation's prison and jail wardens scramble to respond to coronavirus threat, ABC News (March 19, 2020); <https://abcnews.go.com/Health/fearing-outbreaks-riots-nations-prison-jail-wardens-scramble/story?id=69676840>

¹⁶ Brendan Saloner (Associate Professor) and Sachini Bandera (Assistant Scientist) Johns Hopkins Bloomberg School of Public Health, *To Protect Inmates and the Nation From COVID-19, Release Offenders Who Pose No Threat*, USA Today (March 17, 2020); <https://www.usatoday.com/story/opinion/policy/2020/03/17/protect-nation-covid-19-release-inmates-who-pose-no-threat/5072004002/>

¹⁷ U.S. Attorney General William P. Barr, Memorandum for Director of Bureau of Prisons (April 3, 2020). https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf

release inmates that do not pose a threat to public safety that he has authorized the BOP “to transfer inmates to home confinement even if electronic monitoring is not available . . .”¹⁸

Mr. Erickson’s combination of age and health conditions raise the concern whether Mr. Erickson would survive long enough to avail himself of some future compassionate court action. The emerging regulatory framework would seem to require Mr. Erickson to survive 8 – 13 months within a BOP facility before even being eligible for release to home confinement.

7. 8th Amendment Concerns

These are difficult sentencing issues to confront. In searching for sentencing alternatives in light of this pandemic, the Court must guard against potential violations of the 8th Amendment. Federal and state prisons have not stood idly by as COVID-19 has swept through the country and its facilities. In the name of “protecting inmate health,” prisons of all stripes have imposed *indefinite* “quarantine conditions” – a new label for what amounts to solitary confinement, indefinite lockdowns and dramatic upward security classifications in attempts to keep COVID-19 out of BOP facilities by severely isolating new (or current) federal inmates. “Before the coronavirus . . . there were 60,000 people in solitary confinement. Now, in response to the pandemic, 300,000 state and federal prisoners have been confined to their cells.”¹⁹

¹⁸ Ibid.

¹⁹ Joseph Shapiro, *As COVID-19 Spreads In Prisons, Lockdowns Spark Fear Of More Solitary Confinement*, NPR All Things Considered (June 15, 2020); <https://www.npr.org/2020/06/15/877457603/as-covid-spreads-in-u-s-prisons-lockdowns-spark-fear-of-more-solitary-confinement>

It would offend justice to place Mr. Erickson in solitary confinement around the clock within a federal prison camp, or in a higher security classification federal facility, solely to obtain the health protections that could be afforded through rigid home confinement. In *United States v. Mateo*, it was ruled that even a pre-trial defendant could not be held in conditions which were “qualitatively more severe in kind and degree than the prospect of such experiences reasonably foreseeable in the ordinary case.” 299 F. Supp. 2d 201, 212 (S.D.N.Y. 2004)

8. Conclusion

Under the unique pressures forced upon us by this pandemic, previously untenable and extraordinary sentencing solutions must be considered. Mr. Erickson must be punished, but not at the price of the possible sacrifice of his life or his basic Constitutional rights.

Home confinement is a punishment option that continues the system’s *full* control over an inmate – and the fulfillment of the non-violent offender’s *full* sentence. *And* avoids the serious health risks or death facing this individual defendant.

Dated this 1st day of July 2020.

/s/ Clint Sargent
Clint Sargent
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Sioux Falls, SD 57104
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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing upon counsel via email to opposing counsel, Jeff Clapper.

Dated this 1st day of July 2020.

/s/ Clint Sargent _____

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Letter Details

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July 1, 2020

PAUL A ERICKSON
4904 OXBOW AVE APT 305
SIOUX FALLS SD 57106

TO WHOM IT MAY CONCERN:

This is to certify that Paul A Erickson has been in my care for many years.

He has had a strong recovery from aortic valve replacement and pacemaker implantation surgery in January of 2020. Patient will require quarterly checks for his pacemaker with yearly in-office visits with his cardiologist. Patient is currently managed with a baby aspirin daily. No other therapy or treatment is anticipated at this time.

However, due to recent extraordinary public health events, it must be noted that patient is a male older than 55 years of age who underwent two open-heart surgical procedures and the implantation of both a biological heart valve and a pacemaker. As such, he is uniquely at risk for complications, potentially severe, from exposure to or contraction of the COVID-19 virus.

Patient should not be exposed to closed environments where COVID-19 concentrations are potentially present. Should patient contract COVID-19, he is a substantial risk for a compromised replacement heart valve or even death.

Sincerely,

Jeffry Meyer, MD

EXHIBIT

A

Name: Paul A Erickson | DOB: 9/2/1961 | MRN: E56265 | PCP: Jeffry D Meyer, MD

SARS-COV-2 IGG ANTIBODY - Details

Study Result

Narrative

The FDA has made this test available under an Emergency Use Authorization (EUA). Patients with SARS-CoV-2 IgG antibody may still have viremia for weeks after seroconversion and it is unknown if they are immune to future infection. A negative result does not rule out past or current infection as individuals tested early after exposure may not have detectable IgG antibody and not all individuals will develop a detectable IgG response after infection. Results should always be considered in the context of clinical observations when making a final diagnosis and patient management decisions.

Component Results

Component	Your Value	Standard Range
SARS-COV-2 IGG INTERP	Your Value Negative	<i>Standard Range</i> <i>Negative</i>

General Information

Ordered by Jeffry D Meyer, MD

Collected on 06/01/2020 2:40 PM from Blood (Blood)

Resulted on 06/02/2020 11:25 AM

Result Status: Final result

This test result has been released by an automatic process.

EXHIBIT

B

exhibitsticker.com

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